IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

POSTAL TELEGRAPH-CABLE COMPANY OF WASHINGTON, a Coropration,

Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant in Error.

No. 2268.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF DEFENDANT IN ERROR.

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STATEMENT.

This proceeding is an ordinary condemnation proceeding, brought under the eminent domain stat-

utes of Washington for the purpose of acquiring a right-of-way for a pole line on the respondent's right-of-way between Seattle and Sumas on the international boundary, a distance of something over 120 miles. A preliminary order was entered and in due course the case proceeded to trial before a jury, on the question of damage, and is now for review in this court upon certain errors assigned and directed to matters occurring at the trial, upon such question. The only errors assigned and argued are as to exclusion of testimony and as to certain instructions refused by the court, and a transcript of only such part of the proceedings has been filed as pertains to the errors assigned.

ARGUMENT.

A considerable part of the brief of plaintiff in error is taken up with a quotation and discussion of the various constitutional and statutory provisions under which it was given the right to file and prosecute this proceeding. Both the Federal act and acts similar to the eminent domain statutes of the State of Washington have been passed upon by the courts so often that a discussion of these constitutional and statutory provisions seems unecessary, the rule being well established that compensation must be paid in a proceeding of this kind

prior to obtaining a perpetual easement or right to maintain a pole line by a corporation such as contemplated by the federal statute governing the control of telegraph companies.

> *Western Union Tel Co. vs. Pacific R. R.,* 195 U. S. 540; 49 L. Ed. 312.
>
> *Western Union Tel. Co. vs. City of Richmond,* 224 U. S. 160; 56 L. Ed. 710.
>
> *State ex rel Spokane & British Columbia Tel. & Tel. Co. vs. City of Spokane,* 24 Wash. 53; 63 Pac. 1116.

Notwithstanding the lengthy quotations, we do not understand that counsel contend that the rights which are sought to be acquired by the petitioner in this case could be acquired excepting under a contract with the defendant in error or by paying compensation to be fixed by a jury in a proceeding of this character. It is elementary that no rights are acquired under the federal act, *Western Union Tel. Co. vs. Penn. R. R. supra;* and under Section 9314 of Remington & Ballinger's Codes of the State of Washington no rights can be acquired until due compensation has been fixed and paid.

After the entry of the preliminary order of

necessity, there was only one question raised under the petition in this case and that was the amount of damage to which the defendant in error was entitled for the rights sought to be acquired. Nor is there any question but that the stipulations contained in the petition must of necessity enter the final decree, and that the case as far as the question of damage is concerned must be tried in view of the stipulation as contained therein. We mention these matters here for the reason that a great part of the brief of plaintiff in error is taken up with a citation of statutes and authorities which were before the court below and given effect by it upon the trial.

Pages 25 to 35 of the brief are then taken up with a discussion of the measure of damage in a case of this character. No exceptions to the rule adopted by the trial court were taken and no error assigned upon the question in this court, and the record having to do with this question is not before the court; and it is sufficient to say that the trial court followed the rule as contended for by counsel for the plaintiff in error, and admitted evidence only upon questions going to show the depreciation in value of the use of this 120 miles of right-of-way by reason of the proposed construction of pe-

titioner's telegraph line as outlined in its petition, and subject to the stipulations contained therein, no evidence admitted in respondent's case was excepted to and the argument of counsel upon this question which in this case is not directed to any exception reserved or error assigned is purely academic, and must have been made by counsel for the reason that he could not make any showing by devoting his argument to the errors he assigned, for to repeat no error is assigned by the plaintiff in error as to any evidence offered to show damage, or as to any instruction given by the court upon such question. The only complaint made in the brief is that the witness Middaugh should have been permitted to answer one question propounded, that the witness Craver was permitted to answer one question which was improper, that the court erred in refusing to admit certain testimony on rebuttal, and refused to give certain requested instructions, which are not to be found in the record. No other errors are assigned or argued, and we believe we will be following good practice and the convenience of this court in refusing to argue academic questions, but, in devoting this brief to the errors assigned and argued.

Assignment of Error No. 1.

It is contended that the lower court erred in refusing to permit the witness Middaugh to answer one question which is set forth on page 35 of the brief, and found on page 46 of the record. An examination of the testimony of Mr. Middaugh will show that he did testify generally in answer to the identical question. The objection was sustained to the particular question for the reason that it was confined to the particular right-of-way invloved in this case, concerning which Mr. Middaugh had no knowledge for more than thirteen years. It is true that the witness was superintendent of bridges on this particular line up to the year 1899 (Record p. 43), but it is also shown that he had not been engaged in railroad work for thirteen years (Record p. 49) and that he had not even rode over this line for over six years (Record p. 49). In other words, it was shown that the witness had no familiarity with this particular right-of-way since 1899, had not been engaged in railroading for thirteen years, and as far as the record shows, was not posted on the question of present day methods of either maintenance of way or safe operation.

The witness had already been permitted to testify as an expert over the objection of the defend-

ant in error, that the appropriation of a right-of-way and the construction of a telegraph line under stipulations such as contained in the petition would not cause any injury or damage to the right-of-way of a railroad company, and not depreciate the value of its use for railroad purposes (Record pp. 45 and 46), and his opinion as an expert was already before the jury.

The argument that is made in support of this assignment is based upon the theory that experts not familiar with a particular line of railroad would be disqualified. This argument is unsound for the reason that the witness was permitted to testify generally as an expert, and an objection was sustained only when it was attempted to ask the witness with reference to this particular line concerning which he had no familiarity for more than twelve years. It certainly will not be contended that experts such as referred to in the argument of counsel would be permitted to testifying as to a particular piece of right-of-way concerning which they had no knowledge.

The qualification of an expert witness is largely within the discretion of a trial court. The jury already had his expert opinion and there is nothing in the record or in the briefs to show that the

plaintiff in error was in any way prejudiced even if the witness was qualified. The same matters were gone over with him on both direct, cross and re-direct examination, and he repeatedly gave it as his opinion that there was no damage sustained by reason of the proposed construction of the petitioner's line, the jury did not misunderstand his attitude or testimony.

Assignment of Error No. 3.

Considering the alleged error of the court in overruling an objection made to *one question* asked of the witness Craver, we desire to consider the manner in which this case was tried by the plaintiff in error. Even in the portion of the record which is printed and is before the court, it appears that the petitioner for some reason of its own went into the question of its past performances, it at the time of the trial maintaining a pole line over this right-of-way under contract; and its counsel as will be shown by the record and also by the rulings made by the learned district judge attempted to show the jury that in the past there never had been any damage sustained by the company by reason of the manner in which the postal poles had been maintained, and adduced testimony in his case that in the future poles would be maintained

in the same manner as in the past. We quote from the testimony of the witness Blake:

"Q. In the course of your duties were you frequently required to pass over and along this road and this right of way and inspect the right of way and your telegraph line and wires?

A. I was over the right of way very frequently up to five years ago. I have been over it about once a year since then, I think.

Q. *Have you ever known of any instance where the existence of your telegraph line has caused any interruption to the operation* of the railroad?

A. No sir.

Q. *Or any interference with the uses and operation of the railroad, or of the use of the right of way for railroad purposes?*

A. No sir." (Record p. 32).

And further upon re-direct examination of Mr. Forehand counsel refers for the first time to the very subject matter referred to in the question complained of (Record p. 59):

"Q. As to the situation, say at Pilchuck, if complaint were made by the railroad company or a request to change a pole, could you do so?

A. Yes.

Q. Would you do so?

A. Yes."

The witness Blake, in petitioner's case on cross-examination, further testified:

> "Q. In stating your opinion to this jury of no damage, were you basing that upon conditions as they exist at this time in your pole line along the right of way?
>
> A. Yes." (Record p. 41).

It will also be borne in mind that under the petition, the Telegraph Company acquired the right in all cases to use all that portion of the right-of-way between a line five feet from the outer edge thereof, and a line twenty-five feet from the center of the main track, so that in all cases they had a right to use all the right-of-way from a point between a line twenty-five feet from the center of the track and five feet from the outer edge of the right-of-way and reserved the further right to place poles even closer than twenty-five feet from the track and even between the tracks where it was impossible or *impracticable* for them to place them at a point that distance therefrom, the petition reading:

> "where the location of the main track upon the right-of-way, or the location of buildings, tracks, or other improvements or obstructions upon the right-of-way may make it impossible

to place the poles upon that portion of the right-of-way above described, in which event the *poles will be placed upon the most practicable remaining portion of the right-of-way consistent with the safe and proper construction of said telegraph line.*"

It will also be borne in mind that in their own case it was testified by their own officials that they would probably under this petition and under the stipulation which I have quoted above, assert the right to set poles between the main running track and spurs leading off therefrom, so that their poles would be between the main track and side tracks (Record p. 55). They had such right under the petition, and the only question that was asked Mr. Craver was as to the *additional expense* if any in the maintenance of the right-of-way *if the stipulations* as set forth in the petition *were complied* with, by reason of improvement work similar to that referred to by petitioner's counsel in its own case. We call the court's particular attention to the fact that long prior to Mr. Craver being called, the matter of this work at Pilchuck was taken up by counsel for the plaintiff in error, and his witness, Mr. Forehand, president of the petitioner company, referred thereto (Record p. 59). The question asked Mr. Craver was perfectly competent, and

had in view the obligations as contained in the petitioner's petition, which we do not question become a part of the decree, and we cannot believe that the foregoing error is urged with any seriousness.

Assignments of Error 4 and 5.

We have already pointed out the theory upon which the plaintiff in error tried this case. By direct examination of his own witnesses he first showed that they were familiar with the pole line which is now upon the right-of-way, and in answer to questions propounded by counsel, his own witnesses testified that as the new line would be similar to the pole line as now constructed the right-of-way was not depreciated in value for railroad purposes. This testimony it is true, was incompetent and immaterial, but was offered by petitioner and went in without objection on our part. He also showed from his own witnesses, after qualifying them as experts, that a pole line constructed in the manner as set forth in the petition, subject to the stipulations contained therein, would not damage the defendant in error in any sum whatsoever. Upon cross-examination of his witnesses, excepting the witness Middaugh it was shown that they had not taken into consideration any damage or added expense incident to the maintenance of the right-

of-way by reason of the protection of the Railway Company's property and the safety of its operation by clearing its right-of-way, by reason of handling ties, and by reason of interference with team track facilities. These matters were all put before their witnesses upon cross-examination during the first day of the trial of this case. The witness Middaugh was then called. He was asked as to his familiarity with this particular right-of-way, having formerly been employed as a superintendent of the predecessor in interest of the defendant in error, and was asked as to the damage if any under the terms of the petition under which this proceeding was tried. He was also asked on cross-examination what additional allowance, if any, was made in the necessary maintenance of the right-of-way by reason of the presence of telegraph poles, and he testified that there was little, if any additional expense. The petitioner, then upon re-direct examination went into the very matters with this witness, in his own case, concerning which he is complaining that the lower court refused to permit him to go into on rebuttal.

Referring to Mr. Middaugh's testimony, upon cross-examination he testified that it was necessary in good railroading to keep the right-of-way clear

from combustible material, further testified that there was no additional expense incident to maintaining such right-of-way by reason of the presence of telegraph poles, and in order to bring out this testimony even stronger before the jury, the petitioner on re-direct examination put the following evidence before the jury:

> "Q. (Mr. Hughes) Did you testify that in your experience in the cost of keeping clear of brush of the right of way that the entire right of way would be a dollar and a half to six dollars per mile?
>
> A. No sir; per acre.
>
> Q. That covered the whole of the right of way?
>
> A. That covered the whole right of way.
>
> Q. *Would the presence of telegraph poles add any appreciable amount to that expense?*
>
> A. *No.*" (Record p. 49).

In view of the whole testimony and of the testimony which has just been quoted it comes with bad grace for the plaintiff in error to urge that it should be permitted to go into this same matter upon rebuttal, all his witnesses were presented as experts and men qualified to speak on the question of damage, they were told to consider the rights sought to be acquired and testify to the damage

if any, they assumed the burden of advising the jury, and if they were experts they considered every element properly entering into the question of damage.

It is apparently conceded that under the law of the State of Washington, the burden is upon the petitioner in a case of this character to show the reasonable value of the land, or as in this case, of the easement sought to be appropriated, and in the ordinary condemnation proceeding the burden is upon the petitioner to show not only the value of the property taken, but the damage to the remainder.

> (Section 921, Remington & Ballinger's Annotated Codes and Statutes of Washington. See brief of plaintiff in error, p. 5).

> *Bellingham Bay & B. C. R. R. vs. Strand,* 4 Washington 311; 30 Pac. 144.

The question of the admissibility of testimony upon rebuttal it is true is largely a matter within the discretion of the trial court, but we believe that it would have been an abuse of discretion if in a case of this character the trial court had permitted the petitioner to put in part of its case after the respondent had introduced its testimony. The

burden was upon the petitioner to put before the jury evidence showing the compensation to which the respondent was entitled. Upon cross-examination of the expert witnesses the respondent had a right to show what elements were taken into consideration, and to get their opinion as to whether they considered any condition that would arise and that would result in damage, and upon re-direct examination petitioner had a right to, and did go into the testimony which was developed upon such cross-examination, and all the various elements of damage or claimed damage were brought out either upon direct or re-direct examination. The law in a case of this character is as is shown by the authorities, that the measure of damage is the diminuation in value of the use of the right-of-way, and as said by the courts, this is a question of fact to be determined by the jury, and it is evidence of facts showing such damage which is competent, and it was only such evidence that was adduced by the respondent. No objection was made at the time of the trial that this testimony was incompetent. In fact it was so conceded and no error has been assigned to the point that it was incompetent. In fact, as will be hereinafter pointed out, the petitioner by its requested instructions so recognized. Some cases are cited which are not perti-

nent to the issue discussed, in which a general statement may be found to the point that evidence of the cost of clearing right-of-way is not a proper element of damage, and while this question is not raised we do state that no authority based upon reason can be cited to this court which holds that the added expense incident to the proper maintenance of a railroad right-of-way is not a proper item of damage to be put before the jury. It is not the expense of clearing a right-of-way, but the added expense of maintaining the right-of-way by reason of the presence of the telegraph poles, and it is idle to argue that a railway company can properly maintain its property with a line of poles zigzagging across its right-of-way, and with the consequent inconvenience of handling material and using its facilities, for an annual return for a distance of 120 miles at even the figure as testified to by its witnesses.

We believe that the reasoning as set forth in the cases of *Cleveland etc. Ry. vs. Ohio Postal Tel. Cable Co.,* 67 N. E. 894, and *American Telephone & Telegraph Co. vs. St. Louis etc. Ry.,* 101 S. W. 585, and the authorities therein referred to are sound. However, this discussion neither adds to nor takes from the error which is assigned.

The only cases which are cited in support of this assignment of error are the three cases from the Supreme Court of Illinois. It appears that under the statute of that state in an eminent domain proceeding, the petitioner is not required to introduce proof of damage if any, to property which is not taken. Such is not the statute of the State of Washington, which requires of and places upon the petitioner the burden of proving the value of the land not only taken, but the damage to the remainder.

If the statute, however, was as in Illinois, the plaintiff went into the same question which it sought to go into on rebuttal and the action of the trial court was not an abuse of discretion.

The rule is well settled in cases of this character that the burden being on the petitioner and it being required to go into all questions of damage in its case in chief, it is not proper to go into the same questions on rebuttal.

Seattle & Montana Ry. Co. vs. Reeder, 30 Wash. 253; 70 Pac. 498.

In this case petitioner attempted on rebuttal to show that certain parts of a ledge was shale, the court held as the matter had been referred to in

petitioner's case in chief such evidence was improper on rebuttal.

The burden being upon the petitioner to put before the jury all elements of damage in its case in chief, and it having offered testimony of witnesses vouched for as being competent upon this question, there was no abuse of discretion on the part of the trial court in refusing to permit petitioner to go into this matter a second time.

38 Cyc., 1355.

Marande vs. Texas & P. Ry. Co., 124 Federal 42.

Erie R. Co. vs. Kennedy, 191 Federal, 332.

Mitchell vs. City of Boston, 102 N. E. 127.

To have permitted the petitioner, after having gone into this question to have divided its evidence, would have been to permit it to gain an advantage which is not contemplated in the trial of a case. As stated, the admission of testimony in rebuttal is largely within the discretion of the trial court, and before this court could in any event hold that there was such an abuse of discretion as to authorize a reversal of the lower court, it must find that

the petitioner was prejudiced, and in view of the positive statements of damage made by its witnesses; and in view of the fact that the same matter was covered in its own case by the witness Middaugh, and was called to the attention of each of its other witnesses on cross-examination, its rights cannot under any view of the case be held to have been prejudiced.

Stillwell etc. Co. vs. Phelps, 130 U. S. 520; 32 L. Ed. 1035.

Press Publishing Co. vs. Monteitte, 180 Federal, 356.

Security Trust Co. vs. Robb, 142 Federal 78.

Hornbuckle vs. Stafford, 111 U. S. 389; 28 L. Ed. 468.

Further, as to the witness Colburn, there is nothing in the record to show that he was competent or qualified to testify upon this question, and the record will show that the witness Lynch was on the stand, and gave his testimony on the question of damage after all the matters referred to had been gone into on both direct and cross-examination in the petitioner's case in chief.

Assignments of Error 6, 7, 8, 9, 10, 11 and 12.

These assignments of error have to do with requested instructions which were refused or modified, excepting the last which is directed to error in giving the fourth instruction requested by the respondent.

There is nothing in the bill of exceptions to show what requested instructions were filed by either the petitioner or respondent. The only statement with reference thereto is found on page 101 of the record wherein it is recited that the petitioner and the respondent each filed with the clerk their respective requests in writing for instructions. The requested instructions, however, are not set forth or certified, nor is there anything in the bill of exceptions to show why they were refused. We cannot understand how this court can pass upon these exceptions without there being something in the record to show that they were presented and were so presented as to entitle the petitionr to have them considered by the court.

Metropolitan Railroad Co. vs. Macfarland, 195 U. S. 322; 45 L. Ed. 219.

Elane vs. United States, 159 U. S. 590; 40 L. Ed., 269.

Nelson vs. Flint, 166 U. S. 276; 41 L. Ed. 1002.

National Cash Register Co. vs. Salling, 173 Fed. 22 (C. C. A. 9th).

Considering, however, for the purpose of argument, that the plaintiff in error can under the record urge the exceptions directed towards the refusal of the court to instruct, we will briefly direct the court's attention to the argument as contained in its brief.

I.

The proposed instruction discussed under subdivision 5 of their brief (Assignment of Error 6) and advising the jury that they were not to consider the market value of the land appropriated, was fully covered by the instructions given by the court. In its charge the court instructed the jury as follows:

> "As a *railroad right of way* can only be used for railroad purposes, it *has no market value as land,* and when a telegraph company seeks to condemn an easement for its lines, the just compensation must be arrived at by considering how much the use of the right of way for railroad purposes is diminished in value by

the presence of the telegraph line. That is, *the measure of damages* is the diminution in value of the right of way for railroad purposes caused by the construction, maintenance and operation of the telegraph line, and *in determining this question you should take into consideration all the stipulations contained in the petition* pertaining to the manner in which the petitioner will exercise the easement in question, *the substance of which petition and the stipulations therein contained has already been read to you.*

While *the just compensation* which it is your duty to award, *must be arrived at by considering how much the use of the defendant's right of way for railway purposes is diminished in value* by the presence of the telegraph line of the petitioner, *to be constructed pursuant to the stipulations contained in the petition, you are instructed* that in arriving at such amount *you are not to award anything for remote contingent or speculative consequences.*" (Record, p. 109).

It would be difficult to state the law of the case in any clearer language, or more favorable to the contention made by the petitioner. The court had already stated that the only recovery would be that

of the diminution in value of the use of the right of way for railroad purposes.

II.

Under subdivision 6 of the brief, (Assignment of Error Number 7), counsel urge that the court should have instructed the jury that there was no statute requiring a railroad company to clear its right of way. The court did instruct the jury that under the law a railroad company was required to use reasonable diligence in keeping its right-of-way clear from inflammable material, and if it failed to do so, and damage resulted as a consequence thereof, the railroad company would be liable; specifically, however, instructing the jury that it was not to consider as an element of damage the cost of clearing the right of way unless that cost was increased by reason of the construction of the telegraph line as proposed by the petitioner in its petition. (Record, pp. 106-107). No exception was taken to the instruction as given.

This is the law, irrespective of any statute, as repeatedly announced by both the Supreme Court of the State of Washington, and the federal courts.

Firemans Fund Insurance Co. vs. No. Pac. Ry., 46 Wash., 635; 91 Pac. 13.

Eddy vs. Lafayette, 49 Fed., 807 (C. C. A. 8th); 163 U. S. 456.

2 Thompson on Negligence, Sec. 2270.

The court, after referring to this duty, said:

"The *expense* thereof *would not be chargeable to the petitioner herein* in this proceeding; *provided*, however, that *if you find from the evidence that the necessary expense* thereof *would in any material* or substantial *degree be increased by reason of the construction and maintenance of the proposed telegraph line* upon said right of way, *such additional expense*, if any, *may be considered* by you in arriving at your verdict. *In considering that question*, however, *you are instructed* that you are *not to consider mere fancied or imaginary difficulties, obstructions or obstacles, but only such as are substantial and appreciable.*"

No exception was taken to any part of this instruction, nor was any exception taken during the trial to evidence which warranted the giving of this instruction, and no error is assigned that this instruction is not the law. The subject matter therefore having been fully covered, and the proposed instruction not being applicable to any issue, was properly refused.

New York, Lake Erie etc. Ry. vs. Winters,
143 U. S. 60; 36 L. Ed. 71.

There is a further matter which counsel apparently overlooks and that is the railroad company has a right to conduct its business, and in doing so, to use reasonable business judgment. The testimony shows that for reasonable railroad operation it is necessary to clear, and keep cleared, its railroad right-of-way. It makes no difference whether it is necessary for the purpose of protecting the company from damage suits by reason of spreading of fire, or for the purpose of making its operation more efficient, if it is reasonably necessary so to do. It is not for the petitioner to say that the statute law does not make it absolutely imperative. The petitioner has the right to construct its pole line along this right-of-way upon paying compensation, but it does not have the right in determining the question of damages, to require the railroad company to cease using good business judgment in the maintenance of its property; and if in the use of such business judgment it is necessary to expend more money for efficient operation and safe railroading by reason of the presence of the Postal Company's poles, then the Railroad Company is damaged in that amount. The court told the jury that they

could not consider remote or contingent or imaginary difficulties, and should not consider this question from the standpoint of damages unless the damages were substantial.

III.

Subdivision 7, (Assignment of Error 8), was fully covered by the instructions given by the court and already set out. We note that counsel says that they were greatly prejudiced by failure of the court to give this instruction, which in effect is that the Railroad Company would be under no duty to the Telegraph Company to cut or remove brush; but this instruction which was proposed by counsel, embodied almost the identical language used by the court, and hereinabove quoted, counsel evidently agreeing that if there was an additional expense in cutting brush and caring for the right-of-way by reason of the presence of the telegraph poles, either for the purpose of affording safe operation or preventing the spread of fire, that then the jury should take that into consideration. The instruction as given by the court on page 107 of the record, and which we have referred to under the preceding subdivision, puts this matter before the jury in even more clear and concise language.

As we have said above, it was never urged that the Postal Company should be required to pay any of the expense of clearing the right-of-way. The respondent should recover damages only if such expense was increased by reason of the presence of the petitioner's poles. That is, if it costs more with the poles than without them, it was an element of damage. This is conceded in the instruction which was requested, and as stated, was fully covered by the court. We do not notice the cases cited for the reason that the theory of these cases was followed by the court in its instructions.

IV.

The requested instruction discussed under subdivision 8 (Assignment of Error 9), was fully covered by the instruction as given by the court (Record, p. 109). The jury were told in definite language that the only question for them to consider was the diminution in value of the right-of-way for railroad purposes, and they were earlier told that if they found the damage would not be appreciable they would return a verdict for only nominal damages. There never was any contention made in the trial of the case as to any benefits that might accrue to the Postal Company. The record

will show that the evidence was confined absolutely to the question of depreciation in value of the use with and without the poles.

V.

Under subdivision 9 (Assignment of Error 10) we take it that it is attempted to complain because the court did not call the jury's attention to the stipulations contained in the petition. This assignment is as unmeritorious as those we have already discussed. The court in its instructions, page 102 to page 105, put before the jury all of the stipulations, and advised them that they would go into the decree; and further instructing them on the question of the measure of damage (Record, p. 109), the court stated that the jury in considering that question should take into consideration all of the stipulations contained in the petition.

VI.

Subdivision 10, (Assignment of Error 11), wherein it is claimed that the court erred in telling the jury that he did not want them to understand that he entertained any views on the question of damages. This is so plainly a correct statement to be made by the court as not to merit any discussion.

VII.

Under subdivision 11, reference is made to assignment of error 12, which refers to the giving of what is claimed was the fourth instruction requested by the defendant. These instructions are not printed in the record, but by referring to assignment of error No. 12, we find that it refers to an instruction given by the court, wherein the jury were instructed that there would be nothing in the final decree which would require the Postal Telegraph Company to maintain any part of the right-of-way, *but as far as the public was concerned,* the Railroad Company would be under the same liability to care for, clear and protect the same as if it was not occupied jointly by the Telegraph Company. This certainly is the law, and in view of the statements which were made during the trial of the case, by witnesses for the Postal Company, and the refusal of the petitioner to stipulate that it would assume any liability or would care for any of the right-of-way. it was a proper instruction, although we submit that the error assigned with reference thereto is so indefinite and the discussion so indefinite that upon that ground alone, it would not merit the consideration of this court.

The foregoing are all of the assignments of error with reference to the instructions given and refused which are discussed. We submit that they are all totally without merit, and show the lack of any ground upon which to base a request for a review of this case, which was tried upon a theory of law most favorable to the petitioner.

No complaint is or can be made to the instructions given by the court, and we submit that the requested instructions even if they were properly before the court, so far as pertinent, were fully covered and the case was fairly submitted to the jury from the standpoint of the plaintiff in error. If there was any error in this case it was in refusing the respondent the right to go into matters of damage, which we believe it was entitled to put before the jury. We will say that the return of $15,000.00 for the perpetual right to maintain telegraph poles on the 120 miles of right-of-way, under stipulations which permit their setting at any point upon that right-of-way, giving an annual return upon a basis of four per cent of $600 per year or about $5.00 per mile, amounts to almost the taking of property without any compensation.

We submit that this case was tried before the

jury on the question of damage under rules of law most favorable to the petitioner; that the petitioner put before the jury every matter or thing which was favorable to its contention. The court gave the jury instructions adopting the theory of law urged by the petitioner, having refused to admit evidence upon the theory of respondent, and that the petitioner by reason of the trial before the jury and the verdict returned by it, has no just cause for complaint. It had a fair and impartial trial upon a theory of law proposed by itself, and there is no merit in the errors assigned and argued, and the judgment and decree entered upon the verdict of the jury should be affirmed.

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Attorney for Defendant in Error.